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No. 87-751

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

FRANK C. CARLUCCI, SECRETARY OF DEFENSE, *et al.*,
Petitioners,

v.

JOHN DOE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union is a nationwide, non-partisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and liberties guaranteed by the Constitution. The ACLU has an organizational interest in ensuring that Government agencies respect the constitutional and statutory rights of their employees. We submit this brief *amicus curiae* with the consent of the parties as provided by the rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 30 years, each Branch of the Government has stated it to be a requirement of federal law that a Government employee whose dismissal is sought on grounds of "national security" has the right to appeal to the head of his agency or department. Congress so stated in the Act of August 26, 1950, now codified in 5 U.S.C. § 7532. The Executive Branch so stated in Executive Order 10450, signed by President Eisenhower three years after the 1950 Act. And this Court so stated in *Cole* v. *Young*, 351 U.S. 536, 546-47 (1956), when it explained that the decision to terminate an employee on "national security" grounds is not reviewable outside the agency but that the employee in such a case does possess the right to appeal to the agency head.

Thirty-five years after President Eisenhower signed Executive Order 10450, making explicit that this right to appeal to the agency head obtains in *all* "national security" dismissal cases, the Government now argues it is free to discharge an employee on "national security" grounds without affording that right. This is a radical assertion, contrary to the will of Congress and to the settled interpretation of 5 U.S.C. § 7532. The Court of Appeals properly rejected it.

This case turns on the following undisputed propositions:

First, the National Security Agency initiated proceedings against respondent to revoke his security clearance because the NSA had "[d]oubts about whether respondent's continued *employment* would be consistent with the national security." (Pet. Br.[1] at 37; emphasis added) Respondent was told at the outset that the NSA's objective was "his proposed removal from *employment*." (*Id.* at 6; emphasis added)

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[1] The Government's brief is cited as "Pet. Br."

Second, the NSA did not comply with either of the two statutory provisions governing the dismissal of NSA employees for "national security" reasons, 5 U.S.C. § 7532 and 50 U.S.C. § 833, both of which require that the final decision to dismiss an NSA employee on "national security" grounds be made by the head of the department—*i.e.*, by the Secretary of Defense. (Pet. Br. at 8, 22-27)

Third, Executive Order 10450 requires "the head of the department or agency" to make the final dismissal decision in *all* cases in which doubts exist as to whether the individual's continued employment would be consistent with the national security.

Fourth, the NSA did terminate respondent's employment for reasons of "national security," but the Secretary of Defense refused to hear respondent's appeal.

The NSA charted a course in this case—involving politically charged issues of homosexuality and national security—that was intended to avoid involvement by the politically accountable head of the Department of Defense. There is no need to speculate whether this was done for reasons of administrative convenience (*see* Pet. Br. at 27), or to prevent whatever "mischief" NSA officials may have foreseen in involvement by the Secretary of Defense (*see id.* at 39-40), or simply to insulate the Secretary of Defense from a potentially explosive issue. The crucial fact is that the NSA set out to terminate respondent's employment for reasons of "national security," yet refused to honor the requirement, laid down both by Congress (5 U.S.C. § 7532) and by the President (E.O. 10450), that the agency head make the final dismissal decision in such cases.

The NSA's strategy to circumvent this requirement by bifurcating the employment-termination process into (1) a security clearance determination and (2) a "for cause" termination does not alter the legal consequences of the fact that the NSA intended to and did fire respondent on

"national security" grounds. Although the Government might be justified in proceeding by steps in certain cases—such as where a Government employee's loss of a particular clearance may result, over time, in the employee's discharge because of a lack of openings in positions suitable to the employee's levels of clearance, skills, and experience—those circumstances did not exist here; the Government sought respondent's dismissal from the beginning.

Our argument is in two parts. In Part I, we explain that respondent was dismissed on grounds of "national security" within the meaning of 5 U.S.C. § 7532. We show further that once the Government proceeded to remove respondent from his position on "national security" grounds, the Court's decision in *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), required the Government to follow Section 7532 and allow Doe's appeal of the dismissal decision to the Secretary of Defense. Congress conferred that *right* of appeal upon all Government employees in the Act of August 26, 1950, now codified in 5 U.S.C. § 7532, after carefully balancing the interests of both the Government and its employees in "national security" discharge cases.

In Part II, we demonstrate that even if there were some question as to whether Section 7532 by its terms required the Defense Department to allow an appeal to the Secretary, Executive Order 10450 bound the Department to do so. Since the Department did not do so, the judgment of the Court of Appeals must be affirmed. *Peters* v. *Hobby*, 349 U.S. 331 (1955).

ARGUMENT

I. Respondent's Dismissal Violated 5 U.S.C. § 7532 Because the Government Denied Him His Right to Appeal to the Secretary of Defense.

The Government's discharge of Doe was improper because the Government dismissed him expressly on "national security" grounds and yet denied him his statutory right to appeal to the Secretary of Defense. Before turning to the reasons why it is clear that Congress extended a *right* to appeal to the agency head in "national security" cases, we show that, notwithstanding the circumlocutions used by the Government to describe the relationship between the grounds for Doe's dismissal and "national security," this is a paradigmatic "national security" discharge, falling squarely within the class of "national security" cases that Congress intended to regulate in the Act of August 26, 1950.

A. Respondent Was Dismissed on Grounds of "National Security" Within the Meaning of 5 U.S.C. § 7532.

Before initiating proceedings against respondent, the NSA notified him that it was taking action because it had "[d]oubts about whether respondent's continued *employment* would be consistent with the *national security*." (Pet. Br. at 6, 37; emphasis added) The Government concedes that from the outset the NSA was seeking to *discharge* respondent. (*Id.* at 6) Indeed, the first notice respondent received of proposed action against him, a letter from the NSA's Director of Civilian Personnel, stated bluntly: "I am proposing that you be *removed* from your position with the National Security Agency." (Letter, dated November 23, 1982, from Virginia C. Jenkins, p. 2 (C.A. App.[2] at 83); emphasis added) The letter quoted as authority for its proposed action an NSA regulation providing that "'all employees' em-

[2] "C.A. App." refers to the Joint Appendix in the Court of Appeals, which we understand has been filed with this Court.

ployment with the Agency must be clearly consistent with national security.'" (*Id.*, quoting *National Security Agency Personnel Management Manual 30-2*, ch. 366.2-5a (Aug. 12, 1980))

The Government now says that the cause for Doe's removal was "*related to* national security." (Pet. Br. at 23; emphasis added) The Government elsewhere in its brief describes Doe's firing as having "national security *implications*." (*E.g.*, *id.* at 25; emphasis added) To the extent that these locutions are intended to cast doubt on whether Doe was dismissed on grounds of "national security," they are belied by the language in the notice the NSA issued, which is quoted above. The Government is driven to these circuitous formulations by a necessity to obfuscate the critical distinction in this case—*i.e.*, the distinction between dismissals for reasons of "national security," which is a term of art bringing into play the power and limits of 5 U.S.C. § 7532, and dismissals for other reasons. If any question remained, after reading the NSA's notice, about the grounds for Doe's dismissal, that question would be answered by *Cole* v. *Young*, 351 U.S. 536 (1956), the principal authority relied upon by the Government in this case. *Cole* makes clear that respondent was dismissed precisely on grounds of "national security" within the meaning of Section 7532, as the Court of Appeals properly held. *Doe* v. *Weinberger*, 820 F.2d 1275, 1279 (D.C. Cir. 1987).

The issue before the Court in *Cole* was the meaning of "national security" in the Act of August 26, 1950, now codified at 5 U.S.C. § 7532. *Cole*, 351 U.S. at 538. Cole was a food and drug inspector employed by the Department of Health, Education, and Welfare; he was said to have had a " 'sympathetic association' " with alleged subversives. The Government contended in *Cole* that the 1950 Act applied to Cole's dismissal because his alleged disloyalty would have a negative impact on the general welfare of the nation. *Id.* at 544-51. This Court

rejected that argument, concluding that Congress intended "national security" in the 1950 Act "in a limited and definite sense" to apply only to employees in "sensitive" positions, which did not include a food and drug inspector. *Id.* at 548-51.

Cole makes plain that the NSA's decision to seek Doe's discharge is just the sort of decision that Section 7532 was intended to cover. The NSA's concern was that Doe might compromise the security of classified information. *Cole* explains that the need to protect classified information by dismissing employees who are thought to present risks of disclosure was the core justification for the 1950 Act:

> Throughout the hearings, committee reports, and debates, the bill was described as being designed to provide for the dismissal of "security risks." In turn, *the examples* given of what might be a "security risk" *always entailed employees having access to classified materials*; they were security risks because of the risk they posed of intentional or inadvertent disclosure of confidential information. [351 U.S. at 550 (emphasis added; footnote omitted)]

This Court in *Cole* quoted from the Congressional testimony of Mr. Larkin, the representative of the Department of Defense, which had requested and drafted the bill. *Id.* at 550-51. Mr. Larkin, the Court said, made the above consideration more explicit by defining "security risks" exclusively in terms of their access to confidential and classified material: "[I]f they do not have classified material," Mr. Larkin testified, "why, there is no notion that they are security risks to the United States." *Id.* at 550. *See also id.* at n.13 (the Act was intended to apply to an employee "who is working in some highly sensitive agency doing very confidential, secret defense work").[3]

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[3] Given the Court's elucidation in *Cole* of the underpinnings of Section 7532, the Government's recent statement that "Section 7532 is in fact not concerned with security clearances at all" (Brief for

The dispute concerning respondent's continued employment, moreover, could not fairly be characterized in terms *other than* "national security." NSA employees who sleep on the job or who are incompetent might offer the NSA the option of proceeding to dismiss the employee either on general suitability grounds or, given the agency's mission, on "national security" grounds. But the Government has proffered one *and only one* justification for dismissing Doe on the basis of his private, off-hours sexual activities: the possibility that he might compromise "national security" information. And we are at a loss to imagine a justification other than "national security" for discharging him as a result of whatever sexual liaisons he may have had while on vacation overseas.

B. Once the Government Proceeded to Remove Respondent on "National Security" Grounds, It Was Obligated to Present the Final Dismissal Decision to the Secretary of Defense.

There are at least two dispositive reasons why respondent's dismissal *arose under* Section 7532 so as to trigger the requirement that the Secretary of Defense make the final dismissal decision.[4] The first is that the NSA itself

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the Petitioner at 43, *Department of the Navy* v. *Egan*, 56 U.S.L.W. 4150 (No. 86-1552; decided Feb. 23, 1988)) requires comment. The statement is true only in the narrow sense that Section 7532 is directed towards *employment* termination decisions rather than security *clearance* decisions as such. But after *Cole* there can be no doubt that Section 7532 is concerned with the need to protect classified information through the vehicle of suspending and dismissing Government employees. This is the goal asserted by the NSA in respondent's case from the beginning.

[4] It is undisputed that the NSA did not proceed under 50 U.S.C. § 833, the other theoretically available option in an NSA "national security" dismissal case. As the Government concedes, Section 833 requires a specific finding by the Secretary of Defense that "the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security," 50 U.S.C. § 833(a); Section 833(a) is "a last resort." (Pet. Br. at 24-25)

characterized the action it was taking in terms of "national security." To be sure, the NSA did not specifically cite Section 7532, but it tracked the material language of the statute when it announced its intention to discharge Doe as a security risk out of concern that his "continued employment would [not] be consistent with the national security." (Pet. Br. at 37)

This Court's decision in *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), leaves no doubt that the NSA was bound under the circumstances to adhere to the procedures set forth in Section 7532. Vitarelli was discharged from the Department of the Interior, *inter alia*, because his associations and activities with persons alleged to be sympathetic to the Communist Party showed him to be " 'not reliable or trustworthy' "; his continued employment was therefore said to be " 'contrary to the best interests of national security.' " *Vitarelli*, 359 U.S. at 537. Vitarelli filed suit, claiming that his dismissal had violated certain procedural requirements set forth in the Interior Department's "national security" regulations. The Government responded by sending Vitarelli a new notice of discharge, which omitted any reference to the grounds for discharge, and by expunging from all existing records the previously stated reason for dismissal. *Id.* at 537-38 & n.1. The Government argued that since it possessed the power to fire Vitarelli summarily for any reason, the Court should disregard the original notice the Government sent to him:

> The dismissal itself was fully valid, even though it was not authorized by the 1950 Act. Citing the incorrect authority for the removal cannot affect the operative act of removing petitioner—an act which is sustainable under the Secretary's untrammeled authority to dismiss one in petitioner's unprotected position. Perhaps, in officially terminating petitioner's employment, references to the 1950 Act, the Executive Order, and the security regulations should not have been made since they indicate that petitioner's removal was based upon considerations of na-

> tional security; but where the authority to remove is clear, the validity of the removal should not now turn upon the initial references to the security program which have been expunged. [Brief for the Respondents, No. 101 (Oct. Term 1958), at 21-22]

This Court rejected the argument, responding as follows:

> Respondent misconceives the effect of our decision in *Cole*. It is true that the Act of August 26, 1950, and the Executive Order did not alter the power of the Secretary to discharge summarily an employee in petitioner's status, without the giving of any reason. Nor did the Department's own regulations preclude such a course. Since, however, the Secretary gratuitously decided to give a reason, and that reason was national security, he was obligated to conform to the procedural standards he had formulated in Order No. 2738 for the dismissal of employees on security grounds. [*Vitarelli*, 359 U.S. at 539]

Precisely the same conclusion is required here. Once the NSA proceeded on its stated course to remove respondent for "national security" reasons, it was required to follow the safeguards established by Congress for such personnel actions, notwithstanding the existence of other possible alternative means for achieving the same result. *See also Service* v. *Dulles*, 354 U.S. 363, 381 (1957) (rejecting the argument that an employee's discharge was not on loyalty grounds, and therefore that the employee was not entitled to the procedures governing such discharges, where *one* of several cited sources of authority for his removal was a loyalty regulation). It does not matter whether, as the Government contends (Pet. Br. at 15-18), it could have dismissed respondent in the absence of regulations without any reason. This Court rejected the identical argument in *Vitarelli*. 359 U.S. at 539-40. The short answer is that the Government elected not to proceed either (1) without a reason or (2) for a reason other than "national security," and the Government is bound by that choice here as it was in *Vitarelli*.

Because this case, like *Vitarelli*, turns on the Government's own choice of "national security" as grounds for dismissal, the Government's contention that affirmance would mire agencies in difficult debates as to whether certain employees are being dismissed on "national security" grounds (Pet. Br. at 40) misses the point. This case involves the narrow question whether an agency can state its intention to discharge an employee for reasons of "national security" and nonetheless ignore statutory requirements governing such discharges. *Vitarelli* holds that the Government under these circumstances may not ignore its own regulations. Since agency regulations are of a lower order than statutory requirements imposed by Congress, it follows *a fortiori* from *Vitarelli* that the NSA cannot evade the requirements of a Congressional statute under these circumstances.[5]

The second dispositive reason why the NSA was not free to disregard the requirement of agency-head involvement is found in the language of Section 7532 and in its legislative history. Chief Judge Wald's opinion for the Court of Appeals in this case, in which Judges Bork and Silberman joined, makes a persuasive, and essentially unrebutted, demonstration that under the governing statutory schemes the NSA does not possess an implicit authority to fire an NSA employee summarily on "national security" grounds without involvement by the department head. *Doe* v. *Weinberger*, 820 F.2d at 1278-82. We find it unnecessary to repeat here the analysis of the text and legislative history undertaken by the Court of Appeals, which "effectively shoots down the theory that § 7532 is only an extra option for agencies wishing to fire employees as national security risks." *Id.* at 1280. But we do stress that the legislative history to Section 7532 reveals

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[5] The agency-head requirement of Section 7532, moreover, is carried forward in Executive Order 10450 (see Part II, *infra*) and in NSA regulations. *E.g.*, *National Security Agency Personnel Management Manual 30-2*, ch. 371.2 (Aug. 12, 1980).

in unmistakable terms that Congress did *not* intend the statute to be a mere supplementary way to proceed in "national security" cases, as the Government contends.

Both the Senate and House Reports on the 1950 Act emphasize that the Act was intended to extend to Government employees a *right* to appeal to the agency head. The House Report notes:

> Under present law, with respect to [the Departments of State and Defense], the officer or employee who is suspended or terminated as a security risk is not entitled *as a matter of right* to an appeal to the head of the agency concerned. *This legislation extends this appeal right* to employees of [these agencies]. [H.R. Rep. No. 2330, 81st Cong., 2d Sess. 3 (1950) (emphasis added)]

The Report goes on to state that the House Committee "carefully considered" arguments made by representatives of federal employee organizations that procedures allowing for appeals to an outside agency were needed, "but determined that in the interest of national security an appeal beyond the head of the department or agency concerned was inadvisable." *Id.* at 4. The Senate Report also reflects Congress's intent to protect the "rights of the individual" by providing a right to appeal to the agency head in "national security" cases, S. Rep. No. 2158, 81st Cong., 2d Sess., *reprinted in* 1950 U.S. Code Cong. Serv. 3278, 3279-80, and underscores that the agency head cannot delegate this duty: "It is the intention that the head of a department can delegate his authority to suspend an employee but he cannot delegate his power to terminate the services of an employee * * *." *Id.* at 3280. The Secretary of Defense's refusal to hear Doe's appeal contravened this explicit statement of Congressional intent.

There is, moreover, a fundamental error in the Government's argument that it has an "implicit" right to

discharge employees on "national security" grounds. The error flows from the Government's repeated misuse of a dictum in *Cole*. This Court observed in *Cole* that its decision did not preclude the Government from dismissing "disloyal" employees for "cause" under the personnel laws (the Lloyd-LaFollette and Veterans' Preference Acts). *Cole*, 351 U.S. at 543-44. The Government reasons from this remark (1) that inherent authority must exist to dismiss employees for "cause" on "national security" grounds and, therefore, (2) that the NSA was not bound to follow either Section 7532 or Section 833 in respondent's case. (Pet. Br. at 21-22, 24-25) Both conclusions are wrong.

To begin with, the first conclusion is sheer wordplay, turning *Cole* on its head. *Cole* stands for the proposition that "national security" dismissals are distinct from other dismissals. Section 7532 applies to the former, but not to the latter. The Court's observation that "disloyal" behavior encompasses many things and that the Government does possess the *specific statutory* power under the personnel laws to dismiss Government employees for general "disloyalty" obviously does not mean that there is an *inherent* right to dismiss Government employees summarily under all circumstances, much less in cases in which the Government announces that it is seeking an employee's dismissal for reasons of "national security," thereby triggering the "national security" dismissal statutes.[6]

The Government seized upon this same *Cole* dictum in its brief in *Vitarelli* to urge that Vitarelli's dismissal should be upheld, notwithstanding that the discharge was

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[6] *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839), and the other Government-employee cases the Government cites on page 16 of its brief are not to the contrary. Those cases merely state a presumption in favor of the Government's power, in the *absence* of statutes, to discharge the employees whom it hires. *Cole* teaches that when Congress legislates restrictions in an area, as it did in the "national security" field, that presumption ends.

not authorized by the 1950 Act, "as a valid exercise of the appointive and removal powers of the Secretary of Interior derived from 'the primary source'—the Constitution." (Brief for the Respondents, No. 101 (Oct. Term 1958), at 21) The Court rejected that argument. *Vitarelli*, 359 U.S. at 539. *Cole* could not be read to "justify noncompliance by the Secretary with regulations promulgated by him." *Id.* The effect of the Court's decision in *Cole*, after all, was to *prohibit* the Government from circumventing statutory restraints (contained in the Veterans' Preference Act) governing employee discharges.[7]

The argument the Government advances would radically rework the statutory protections described in *Cole*. This Court explained in *Cole* that the 1950 Act had two central purposes: (1) to allow for immediate suspensions in "national security" cases and (2) to provide for termination, without benefit of outside appeal, by *agency heads*. *Cole*, 351 U.S. at 546. The Court observed that an "obvious justification" underlay the former purpose, and then stated:

> Likewise, there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information. [*Id.*]

As noted above, the requirement that the agency head make the final decision in a "national security" case involving loss of employment was an important purpose of the 1950 Act, particularly because of the *unavailability*

[7] Again the Government resurrects here an argument it pressed unsuccessfully in *Vitarelli*: that the 1950 Act "did not confer upon petitioner any procedural or substantive rights against removal"; that the Act's purpose was simply to facilitate removal by summary procedures. *Compare* Brief for the Respondents, No. 101 (Oct. Term 1958), at 9, *with* Pet. Br. at 29-32.

of outside review of the merits, a proposition reaffirmed in *Department of the Navy* v. *Egan*, 56 U.S.L.W. 4150 (No. 86-1552; decided Feb. 23, 1988).[8] But the Government ignores the corollary proposition that Congress believed, on balance after careful consideration, that outside appeals were unnecessary to protect employee rights *because* Congress was granting employees in the 1950 Act the *right* to appeal to the agency head. H.R. Rep. No. 2330, at 3-4. The failure of the department head to make the final decision in such a case has long been reversible error. *See Kutcher* v. *Gray*, 199 F.2d 783, 787-88 (D.C. Cir. 1952).[9]

The Government contends that respondent should not complain because he "received greater protections under NSA regulations than either [Section 7532 or Section 833] affords." (Pet. Br. at 11-13, 33-34) This argument is wrong. First, an agency may not impose a trade-off upon a Government employee to whom Congress has granted explicit statutory protections on the agency's own view that the latter are less valuable than those the agency chooses to provide. Second, the NSA's "for cause" regulations are irrelevant to the interpretation of Section 7532: The regulations post-date the 1950 Act;

[8] *Egan* holds that Government employees are not entitled to outside review of the merits of security-clearance decisions that result in discharge, regardless whether the Government follows a procedure that specifically provides for outside review of the dismissal decision. Judicial review of agency compliance with the Constitution, federal statutes, and federal regulations remains available in such cases, however. *See Webster v. Doe*, 56 U.S.L.W. 4568 (No. 86-1294; decided June 15, 1988); *id.* at 4570 n.8.

[9] The Government's proposed interpretation of Section 7532 is, moreover, fundamentally inconsistent with President Eisenhower's interpretation of the 1950 Act in Executive Order 10450 (see Part II, *infra*), as well as with DOD Directive No. 5100.23 (May 17, 1967), under which the Secretary of Defense "in accordance with" Section 7532 and E.O. 10450, expressly withheld from the head of the NSA the power "to terminate the services of an employee in the interest of national security."

unlike Section 7532, they apply only to the NSA rather than Government-wide; and, unlike Section 7532, they can be rescinded by the agency at any moment, leaving NSA employees altogether without their protections. The Court of Appeals correctly held that agency-head involvement in discharge cases is, under the existing procedural scheme, an *additional* safeguard for the employee. *Doe* v. *Weinberger*, 820 F.2d at 1282.

Finally, the Government states that affirmance in this case "would lead to mischief extending well beyond NSA," because "every routine decision to revoke a required clearance would require procedures suitable to an immediate threat to national security, including the personal attention of the head of the agency." (Pet. Br. at 39-40) This statement is inconsistent with the assurances the Government provided to the Court just a few months ago in *Egan*, that "removal is by no means an automatic *or ordinary* consequence" of the denial or revocation of a clearance (Brief for the Petitioner, No. 86-1552, at 12; emphasis added) and that "[t]he denial or revocation of a security clearance need not, and *quite commonly* does not, lead to any 'adverse action'" (*id.* at 24 n.13; emphasis supplied). Affirmance would simply mean that the Government could not evade Congressionally imposed safeguards in the *non*-ordinary and *un*common situation where an employee's removal is sought on grounds of "national security." If the Government objects to the requirement that the head of the agency give his "personal attention" to such discharges, the Government must seek relief from Congress, not this Court.

II. The Government's Proposed Interpretation of Section 7532 Is Precluded as a Matter of Law by Executive Order 10450.

Even if Section 7532 did not apply by its terms to the dismissal in this case, affirmance would still be necessary

because the NSA did not comply with the *mandatory* language of Executive Order 10450. The preamble to Executive Order 10450 states that it was intended to protect both the national security interest and the procedural and substantive rights of Government employees. A principal source of authority for the Order was the 1950 Act, which the Order interpreted and implemented. Sections 5 and 6 of the Order govern Executive Branch dismissals of employees from *any* department or agency on "national security" grounds, and cite the 1950 Act. Those sections make clear that the head of the department or agency must make the final termination decision in *all* cases of dismissal of Government employees on "national security" grounds: "*Whenever*" it appears that the retention of any Executive Branch employee "may not be clearly consistent with the interests of the national security, * * * *the head of the department or agency* concerned *shall* terminate" the individual's employment (emphasis added).[10]

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[10] Sections 5 and 6 provide in full:

> Sec. 5. *Whenever* there is developed or received by *any department or agency* information indicating that the retention in employment of *any officer or employee of the Government* may not be clearly consistent with the interests of the national security, such information *shall* be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, *shall* review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.
>
> Sec. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as

Agencies are, of course, bound by executive orders, *Peters* v. *Hobby*, 349 U.S. 331, 345 (1955), just as they are bound by their own regualtions, *Vitarelli*, *supra*; *Service* v. *Dulles*, 354 U.S. 363 (1957). And it has been squarely and correctly held that a dismissal decision must be reversed if it violates Executive Order 10450, regardless whether the decision technically complies with the 1950 Act. *Haynes* v. *Thomas*, 232 F.2d 688 (D.C. Cir. 1956). The Court of Appeals held in *Haynes* v. *Thomas* that Executive Order 10450 was intended to afford the protections of the 1950 Act to probationary employees; therefore, the court held, even if the 1950 Act by its terms did not protect probationary employees, the Government's failure to comply with the Act's procedures in the case of Haynes, who was a probationary employee, was still reversible error. 232 F.2d at 692. The NSA's action in Doe's case also violated Executive Order 10450, because the NSA denied him a protection extended in the Order to *all* Executive Branch employees. The NSA's dismissal decision therefore cannot stand.

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he deems necessary, *the head of the department or agency concerned shall terminate* the employment of such suspended officer or employee *whenever he shall* determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950. [Emphasis added.]

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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